IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2988 OF 2001.

Tata Memorial Centre. ... Petitioner.

V/s.

Tata Memorial Hospital Kamgar Sanghatana and others. ... Respondents.

S.K.Talsania, senior counsel i/b. Mulla and Mulla & Craige Blunt & Caroe for the petitioner.

Susheel Mahadeshwar for the respondents.

CORAM : V.C. DAGA, J.

RESERVED ON : 1st March, 2006.

PRONOUNCED ON : 28th April, 2006.

JUDGMENT :

. Heard learned counsel for the rival parties. Perused petition and counter affidavit.

2. This petition is directed against the order dated 12th October, 2001 passed in Complaint (ULP) No.1272 of 1993 by the Industrial Court, Mumbai holding that the petitioner- hospital has resorted to unfair labour practice prescribed under Item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 ("MRTU & PULP Act" for short) with further direction to treat

the date of birth of respondent No.2 (the original complainant No.2) as 31st August, 1937 and to treat him retired on completion of 60 years i.e. on 31st August, 1997 with further direction to make payment of wages and monetary benefits to respondent No.2 for the period during which he was not allowed to work.

The Facts :

3. The facts giving rise to the present petition, in nutshell, are that the petitioner is a society registered under the Societies Registration Act and also a Public Trust working under the administrative control of the Atomic Energy, Government of India.

4. The respondent No.1 is a registered Trade Union of which respondent No.2- workman is a member. Respondent No.2 joined the services of the petitioner- hospital in the year 1966. According to the petitioner, at the time of joining employment respondent No.2 did not produce any proof of age and declared that he was not in a position to produce any birth certificate or any other proof to establish his age and expressed that his age may be determined on the basis of the medical report to be obtained from the medical

officer appointed by the petitioner- hospital.

5. The Medical Examiner, on 4th November, 1971, appears to have opined that the age of respondent No.2, on that date, was 38 years. Accordingly, his date of birth came to be recorded as 4th November, 1933 in the records of the petitioner- hospital.

6. According to the petitioner, almost about 20 years later, respondent No.2 filed an affidavit saying that he was born on 8th August, 1937 without producing any document in support of his claim.

7. According to the petitioner, although application for correction of date of birth was made at belated stage i.e. on 27th December, 1990, the petitioner called upon respondent No.2 to submit evidence for considering his case for change of date of birth. That respondent No.2, in spite of repeated reminders, failed to furnish particulars/ information as such his date of birth was treated as 4th November, 1933. That is how, his date of superannuation was determined as 4th

November, 1993. Accordingly, memorandum was sent to him that he would stand superannuated from afternoon on 30th November, 1993.

8. The respondent No.2, just prior to date of retirement conveyed to him, filed a complaint before the Industrial Court, Mumbai being Complaint (ULP) No.1272 of 1993, inter alia; alleging therein that by retiring him from 30th November, 1993 the petitioner has committed unfair labour practice under Items 4(a) and 4(f) of Schedule II and under Item 9 of Schedule IV of the MRTU & PULP Act.

9. The case sought to be made out by the respondents/ complainants before the Industrial Court was that at the time of entry, since there was no documentary evidence available with him, his date of birth was allowed to be determined on the basis of medical examination as 4th November, 1933. That during the course of employment, when the question of issuance of the identity card came up, he was asked to make application in the prescribed form. Accordingly, he submitted his application for issuance of identity card

mentioning therein his correct date of birth as 8th August, 1937. The same was duly verified and signed by the then Junior Administrative officer Shri Inamdar and approved by the then Administrative Officer Shri M.P.Naik of the petitioner- hospital. According to the respondents/ complainants, the hospital authorities maintained confidential record of all the employees including that of complainant/ respondent No.2 herein; and almost for a period of seven years i.e. from 1980 to 1987, the date of birth of respondent No.2 was recognised in the confidential record as 4th August, 1937. According to the respondents/complainants this date of birth i.e. 4th August, 1937 came to be recognised after due verification. That is how, the originally recorded date of birth "4th November, 1933" came to be substituted with that of "8th August, 1937" and the same was acted upon by the petitioner- hospital almost for a period of seven years. The respondents, thus, submitted that the said substituted date of birth i.e. 4th August, 1937 could not have been changed by the petitioner- hospital to his prejudice without giving him due notice or following principles of

natural justice.

10. The respondents/ complainants, thus, alleged in the compliant that the change of date of birth from "8th August, 1937" to "4th November, 1933" without following principles of natural justice and making respondent No.2 to retire before completing age of 60 years amounts to unfair labour practice under Items 4(a) and 4(f) of Schedule II and Item 9 of Schedule iV of the MRTU & PULP Act.

11. On being noticed, the petitioner- hospital appeared in the complaint proceedings before the Industrial Court and reiterated their stand reproduced hereinabove in paras-4 and 7 (supra).

12. The petitioner- hospital sought to make out a case that while issuing identity card, a mistake was committed by the departmental clerk and that the date of birth of respondent No.2 came to be wrongly recorded as 8th August, 1937. According to the petitioner, the mistake was inadvertent. The said mistake continued during

the period 1982 to 1989; in the yearly confidential records of respondent No.2. In the submission of the petitioner, the wrong recording of the date of birth in the confidential records of the petitioner does not prove that the date of birth of respondent No.2 is 8th August, 1937.

13. Both parties with the aforesaid rival pleadings on record led their respective evidence before the Industrial Court. The respondent No.2 examined himself and deposed in consonance with his complaint. The respondents/ complainants brought on record that the change in date of birth brought about by the petitioner- hospital from 8th August, 1937 to 4th November, 1933 somewhere after year 1987 was not fair and proper. A protest letters in this behalf was issued with a request to restore the date of birth of respondent No.2 as 8th August, 1937 as correct date of birth. The said letters are dated 18th December, 1990; 7th February, 1993; 21st July, 1993 and 16th August, 1993. The respondent No.1- Union has also issued letter dated 25th August, 1993 objecting to the unilateral change in date of birth of respondent No.2. However, the petitioner- hospital, by their

letter dated 2nd September, 1993, declined to accept the contention of the respondents and refused to correct the date of birth.

14. The petitioner- hospital examined its Administrative Officer, who admitted that there has been a practice in the Tata Memorial Hospital to issue identity cards to its employees. Accordingly, respondent No.2 was also issued such identity card for which he was required to submit an application in the prescribed form. The application moved by respondent No.2 came to be marked as Exh.U-10 Exh.U-10 reveals right tick mark ( ) in the column of date of birth. He has also admitted that there is signature of Junior Officer evidencing verification of information provided by respondent No.2- workman in column Nos.1 to 6 of Exh.U-10. He also admitted that there is a right tick mark in Red colour against item at serial No.6. The said serial No.6 is a column meant for writing date of birth of the applicant. Exh.U-10 mentions, in column No.6, date of birth of respondent No.2- workman as "8th August, 1937". That there is a signature of the Clerk, while Junior Officer’s signature is in Blue

ink evidencing verification thereof.

15. The Industrial Court on evidence came to the conclusion that the date of birth of respondent No.2- workman recognised by the petitioner- hospital was 8th August, 1937 as such he could not have been made to retire prior to 8th August, 1997. Accordingly, declaration of unfair labour practice was made by the Industrial Court vide its order dated 12th October, 2001 with consequential directions to the petitioner-hospital.

16. The aforesaid order of the Industrial Court dated 12th October, 2001 is a subject matter of challenge in this petition filed under Articles 226 and 227 of the Constitution of India.

Rival Submissions :
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17. Mr.Talsania, learned senior counsel appearing for the petitioner, relying on the judgment of the Apex Court in the case of **State of U.P. & Anr. v. Shiv Narain Upadhyaya**, JT 2005 (6) SC 444 contends that unless a clear case on

the basis of clinching conclusive material, is made out, that too; within a reasonable time as provided in the rules governing the service conditions, no Court or Tribunal is expected to issue directions or make declaration on the basis of the material which make such claim only plausible. In other words, before any such direction could be issued or declaration made, the Court or the Tribunal must be fully satisfied that there has been real injustice caused to the person concerned and that his claim for correction of date of birth is genuine and that he has followed procedure prescribed while applying for correction well within time fixed by any rule or order.

18. Mr.Talsania further placed into service another judgment of the Apex Court in the case of **G.M.Bharat Coking Coal Ltd. v. Shib Kumar Dushad**, (2000) 8 SCC 696; wherein the Apex Court ruled that where the date of birth as entered in service record is questioned before the Court by an employee shortly before his retirement, burden lies heavily on him to establish his stand by producing acceptable evidence of clinching nature. He, thus, submits that the Industrial Court could

not have entertained the complaint in question and no declaration in favour of respondent No.2-workman could have been made.

19. Per contra, Mr.Mahadeshwar appearing for the respondents submits that the petitioner-hospital was not justified in unilaterally changing the date of birth of respondent No.2-workman to his prejudice from 8th August, 1937 to 4th November, 1933. He submits that change of date of birth effected by the hospital management somewhere in the year 1980, from "4th November, 1933" to "8th August, 1937", is bad and illegal. He further submits that had there been a clerical mistake or any mistake inadvertently made by the hospital authorities, even then it was obligatory on the part of the petitioner- hospital to issue notice to respondent No.2 so as to bring to his notice alleged mistake, if any, committed by its staff. No change in date of birth prejudicially affecting interest of respondent No.2- workman could have been made by the hospital.

20. Mr.Mahadeshwar further submits that mistake is a question of fact; which is required

to be proved as any other fact. He further submits that this mistake has not been proved by the petitioner- hospital either before the Industrial Court or before this Court by leading cogent evidence. He, thus, submits that possibility of mistake has to be ruled out for want of evidence. He went on to submit that once the mistake is ruled out or held to be not proved by the petitioner- hospital, then the acceptance of date of birth of respondent No.2 as 8th August, 1937, backed by verification by the junior as well as senior administrative officers, is sufficient to raise a presumption that an official act done in official capacity was done in accordance with law. The change of date of birth from "4th November, 1933" to "8th August, 1937" has to be treated as legal change in absence of any legal evidence to demolish or rebut this presumption. In his submission, change of date of birth from 8th August 1937 to 4th November, 1933 is arbitrary and in breach of principles of natural justice. He pressed into service judgment of the Apex Court in the case of **State of Orissa v. Dr.(Miss) Binapani Dei**, 1967 II L.L.J. 266 in support of his submission. He also relied upon another

judgment of the Apex Court in the case of **Sarjoo Prasad v. General Manager**, 1981 (43) F.L.R. 408; wherein the Apex Court ruled that before any alteration of date of birth is made; opportunity of hearing is necessary. In that case, order of retirement and order correcting date of birth came to be set aside.

21. Mr.Mahadeshwar further submits that the action of the petitioner- hospital unilaterally changing date of birth of respondent No.2- workman is clearly an unfair labour practice within the meaning of Item 9 of Schedule IV of the MRTU & PULP Act.

22. Mr.Mahadeshwar placed reliance on the judgment of learned single Judge of this Court in the case of **Rajya Sahakari Krushi v. Maharashtra State Co-op. Agri. & Rural Dev. Bank Ltd.**, 1996 I CLR 54; wherein the employer had unilaterally made alteration in her date of birth in her service record. It was objected by her, contending that unilateral decision by the bank in making such alteration without notice to her was

in breach of principles of natural justice. This submission made on her behalf found favour with this Court while considering the petition; wherein rejection of interim relief was challenged by the workman.

The Issue :

23. On the basis of the rival pleadings, the question that arises for consideration is:

> Whether unilateral change of date of birth from "4th November, 1933" to "8th August, 1937" in the records of the petitioner-hospital was in accordance with law?

Consideration :

24. Having noticed the rival pleadings, submissions and evidence available on record, the emerging undisputed facts are that, at the time of entry in the employment the date of birth of respondent No.2- workman was recorded as 4th November, 1933 on the basis of medical report since he did not have any documentary proof to establish his date of birth. That the said date of birth continued to be in record of the

petitioner- hospital right from 1971 to 1980. However, in the year 1980, at the time of issuance of the identity card, the applications in the prescribed forms were invited from the employees of the hospital. Such application was submitted by respondent No.2. His application was verified by one Clerk and two Administrative Officers of the petitioner- hospital, in which date of birth was mentioned as "8th August, 1937". On verification, identity card was issued to him. This date of birth i.e. 8th August, 1937 continued to be the date of birth of the workman in the records of the hospital right from 1980 to 1987. Subsequently, unilaterally, without any prior notice the hospital authorities changed the date of birth of respondent No.2 from "8th August, 1937" to "4th November, 1933".

25. The defence raised in the written statement filed by the petitioner- hospital is that a clerical mistake was unknowingly committed by the departmental clerk; who had prepared identity card. Further defence is that wrong recording of date of birth during the period from 1982 to 1989 does not prove date of birth of

respondent No.2- workman which he claims to be 8th August, 1937.

26. Let me examine strength of the above defence. It has come on record that respondent No.2- workman had filed an application to seek identity card, specifically, mentioning therein his date of birth as 8th August, 1937. It has also come on record that the said details were verified by the Junior as well as Senior Administrative Officer of the hospital. After basic examination by the concerned clerk. A right-tick-mark (----) put against the column of date of birth in the application is not in dispute. It is not the case of the petitioner-hospital that both i.e. Junior and Senior Administrative Officers were negligent in discharge of their duties or that they both committed mistake while verifying all the details furnished in the application by respondent No.2-workman. The alleged mistake of the Clerk alone is pleaded in defence.

27. With the aforesaid pleadings in defence, let me turn to the evidence on record. There is

absolutely no evidence on record to prove mistake of fact. Onus clearly lies on the petitioner-hospital to prove that verification and acceptance of the date of birth furnished by the complainant-workman was under mistake. Mistake is a question of fact. It is required to be proved as any other fact. There is no foundation whatsoever in the evidence to prove mistake on the part of the hospital management. This onus has not been discharged by the petitioner- hospital. Needless to mention that where principal allows his agent or servant to do a particular act, then knowledge of that agent or servant must be implied to the principal. In such a case, the principal cannot be heard to say that he was acting under mistake of fact.

28. As already mentioned hereinabove, it has come on record that two officers of the petitioner- hospital have verified the entry of date of birth of respondent No.2- workman in discharge of their official duties. As already stated, an official act done in official capacity has to be presumed to have been done in proper manner.

29. A general rule as to onus of proof is that the issue must be proved by the party who states affirmative and not by a party who states negative. If, under the law or on facts, either admitted or proved, a presumption arises in favour of any party, the burden of proof will lie on the adverse party to rebut it. Here the respondents/ complainants' case is that the date of birth "8th August, 1937" of respondent No.2- workman came to be accepted after due verification by the officials of the hospital. The document (Exh.U-10) has been admitted by the hospital. It bears signatures of the authorities of the hospital evidencing proper verification thereof. There is nothing suspicious on the face of the document to doubt its genuineness rather genuineness of document is not in dispute. In the circumstances, presumption arises in favour of respondent No.2- workman that the official act has been done in proper manner while scrutinising his application and that his date of birth as written was validly accepted. If the petitioner- hospital wanted to contend that the date of birth was accepted under a mistaken belief; then it was for

the petitioner to prove this fact and discharge that burden.

30. A general rule is that the burden lies on the authority asserting a particular fact. A presumption of fact is an inference from certain facts and patterns drawn on experience and observation from the common nature of work, constitution of human mind, the springs of human action, usage and habits of the society and ordinary course of human affairs. Thus, considering the material available on record and absence of any evidence to rebut presumption, any judicial mind has to accept that the date of birth of the workman is 8th August, 1937 and that it has been accepted by the hospital management after due verification.

31. Having said so, the question comes what steps the petitioner- hospital was suppose to take before taking unilateral decision to change the date of birth of respondent No.2- workman from 8th August, 1937 to 4th November, 1933. The law laid down in this behalf is to be found in the case of **State of Orissa v. Binapani Dei** (supra); wherein

it has been clearly laid down by the Apex Court that without giving notice or opportunity of hearing to the workman, his date of birth cannot be altered to his disadvantage or prejudice because it is an administrative order which involves civil consequences. Any adverse change or action must be made in conformity with the rules of natural justice; which at its lowest minimum mandates prior notice and opportunity of hearing to the person affected thereby. That, admittedly, having not been so done by the petitioner- hospital, action of the petitioner-hospital retiring workman before the date of superannuation must fail. The aforesaid view of the Apex Court is followed by its three judge Bench in a case of **Sarjoo Prasad** (supra).

32. In the above view of the matter, no fault can be found with the view taken by the Court below. The respondent No.2- workman has to be treated as continued in service till the date of his superannuation.

33. Now I have reached the stage for considering proper reliefs to be granted in the

light of my findings recorded hereinbaove. Once it is held that the action of the petitioner-hospital is not legal and valid and the impugned order is proper, the logical consequence would be that respondent No.2- workman should be entitled to reinstatement with continuity of service and, in normal course, to full back wages. However, since he has crossed age of superannuation on 8th August, 1997, the question of reinstatement is out of question. Now the question is, whether or not the respondent No.2- workman would be entitled to full back wages for the intervening period of four years i.e. from 16th September, 1993 to 8th August, 1997. However, in my view, in peculiar facts and circumstances of the case, it would not be proper to grant full back wages to respondent No.2- workman, even-though he was held entitled in the impugned order by the Court below. The reasons for not granting full back wages for the aforesaid period of four years can now be indicated.

34. Firstly, for no fault of the contesting parties the litigation has been lingered for more than 13 years. The impugned action of the

petitioner- hospital of the year 1993 retiring respondent No.2 has been set aside vide impugned order in the year 2001 on the technical ground of procedural breach leading to breach of principles of natural justice. To saddle the petitioner-hospital and its exchequer, which is meant for public benefit, with full back wages of respondent No.2- workman for the entire period of four years would be too harsh to the petitioner- hospital.

35. The respondent No.2- workman is also not at fault as he was clamouring for justice in all these years. However, this delay in court proceedings for no fault of either side permits me to adopt equitable approach not to burden the petitioner- hospital, being a public body, with the full back wages for the entire period of four years.

36. It is not in dispute that respondent No.2-workman has not worked during this period. Earlier he was working as Electrician Grade-A and thereafter he was promoted as Tradesman Grade-F. He cannot be presumed to be without any work during this period. He did not serve employer

during this period, as such, in my view, the respondent No.2- workman would not be entitled to full back wages for the idle period. In the circumstances, relying on the equitable principle of no work no pay; and taking overall view of the matter including technical procedural breach working to the benefit of respondent No.2- workman and considering the interest of justice, it would be reasonable to award 50% back wages to respondent No.2- workman for the aforesaid period of four years. However, the respondent No.2- workman would be entitled to claim retirement benefits, if any, computed on the basis of his date of birth as 8th August, 1937. He shall also be entitled to re-fixation of pensionary benefits, if available under service conditions or rules governing his employment. Arrears of salary computed on the basis of 50% back wages as indicated should be paid to respondent No.2- workman within a reasonable time not exceeding three months from today, failing which, arrears shall carry interest at the rate of 10% per annum with the expiry of three months.

37. In the result, petition is partly allowed.

The impugned order is set aside to the extent it grants full back wages for the intervening period of four years and stands substituted with that of 50% back wages in place of full back wages awarded by the Court below. Rest of the judgment and order of the Industrial Court is confirmed.

. Rule is partly made absolute with no order as to costs.

(V.C.DAGA, J.)